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No.

IN THE

Supreme Court of the United States

October Term 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND
AMERICAN FAMILY ASSOCIATION, INC.,

PETITIONERS,

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ACTION FOR CHILDREN'S TELEVISION, et al.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Is indecent broadcasting a form of unprotected speech, to wit, speech that constitutes a nuisance?

2. If the plurality opinion in Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), continues to be the holding of the Court, did the Court of Appeals for the District of Columbia Circuit err in holding that the Federal Communications Commission must adopt a "safe harbor" approach to indecent broadcasting?

3. Is the prohibition in Title 18 United States Code, section 1464 regarding indecent language an "indecent for all" standard?

4. Does the decision of the court below, requiring the Federal Communications Commission to demonstrate that the restriction on indecent broadcasting is the least restrictive means of furthering a compelling governmental interest, comport with Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), and Federal Communications Commission v League of Women Voters, 468 U.S. 364 (1984), both of which applied a different standard of review to the broadcast regulation at issue?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the District of Columbia Circuit; the petitioners in this Court are italicized:

Petitioners: Capital Cities/ABC, Inc.; Action for Children's Television; American Civil Liberties Union; Association for Independent Television Stations, Inc.; Infinity Broadcasting Corporation; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Broadcasting Company; National Public Radio; People for the American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; Society of Professional Journalists; The Pacifica Foundation.

Respondents: Federal Communications Commission and United States Department of Justice.

Intervenors: *Children's Legal Foundation, Inc. and American Family Association, Inc.* on behalf of Respondents. PEN American Center, Allen Ginsberg, et al. on behalf of Petitioners.

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ACTION FOR CHILDREN'S TELEVISION, *et al.*,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in Action for Children's Television v Federal Communications Commission, No. 88-1916, on May 17, 1991. The judgment enjoined the Federal Communications Commission from enforcing the prohibition against the broadcast of indecent material as proscribed by Title 18 United States Code, section 1464.

OPINION BELOW

The Court of Appeals for the District of Columbia Circuit is reported at 932 F.2d 1504. The opinion of the court is

reprinted in the Appendix at page A2.

The Report of the Federal Communications Commission is reprinted in the Appendix at page A17.

JURISDICTION

The judgment to be reviewed was entered on May 17, 1991. The petition to rehear was denied on August 28, 1991.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statute under review in this case, 18 U.S.C. §1464 provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

In 1988, as a part of the FCC's appropriation bill for fiscal year 1989, the law was amended to include the

following language:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Pub. L. No. 100-459, §608, 102 Stat. 2228 (1988).

The Commission's conclusions in its Report on the Notice of Inquiry stated:

> 91. Based upon the information contained in the record and discussed in this Report, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in Sable, we conclude that the 24-hour prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in ACT II, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the NOI, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties

wished to address. Over 92,500 comments have been received in response to this NOI, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the compelling governmental purpose of protecting children. Adults, on the other hand, have other means to access such material should the so desire.

93. To comply with Sable's requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions are taken only against those stations that broadcast indecent material when children are in the audience.

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, MM Docket No.

89-494, 5 FCC Rcd 5297 (Aug. 6, 1990) at 41.

STATEMENT OF THE CASE

Facts

On October 1, 1988, the President signed into law a 1989 appropriations bill that required the provisions of Title 18, United States Code, section 1464 be enforced 24 hours each day. The Commission promulgated rules prohibiting the broadcast of all indecent material. This action was commenced in the Court of Appeals for the District of Columbia Circuit in 1989. The Court of Appeals took jurisdiction over the matter pursuant to 28 U.S.C. §2342(1).

On September 3, 1989, the Court of Appeals remanded the cause to the Federal Communications Commission "to conduct a full and fair hearing on the propriety of indecent broadcasting" in light of this Court's decision in Sable Communications of California, Inc. v Federal Communications Commission, 492 U.S. 115 (1989).

On October 26, 1989, the Commission adopted a Notice of Inquiry to initiate the proceeding under remand from the Court of Appeals. The Notice of Inquiry was released on November 20, 1989. Comments were filed on February 20, 1990, and reply comments were filed on April 19, 1990. The Federal Communications Commission received approximately 92,500 informal and formal comments to the Notice of Inquiry.

On August 6, 1990, after careful consideration of all of the Comments, the Fcc issued its Report which found that prohibiting broadcast indecency 24-hours a day comported with the constitional standards ennumciated in Sable.

Following the FCC's Report and after briefing by all parties the Court of Appeals heard oral argument in the matter on January 28, 1991 and issued its decision on May 17, 1991.

REASONS FOR GRANTING THE WRIT

I. IS INDECENT BROADCASTING A FORM OF UNPROTECTED SPEECH, TO WIT, SPEECH THAT CONSTITUTES A NUISANCE?

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, TO – WIT: THAT INDECENT BROADCAST IS PROTECTED BY THE CONSTITUTION AND THAT A TIME 0F DAY MUST BE FOUND WHEN THE BROADCAST PIG CAN ENTER UNINVITEDLY INTO THE PRIVACY OF EVERY HOME.

In Action for Children's Television v. Federal Communications Commission, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"), a panel of the Federal Circuit, "adhering to the view that broadcast material that is indecent but not obscene may be channeled to certain times of day but not proscribed entirely," invalidated the FCC's "hours restraint" and remanded for reconsideration of "the times at which programs containing indecent material may be broadcast." Id., at 1335, In Action For Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C. Cir. 1991) (ACT II"), a second panel of the Federal Circuit, believing that the disposition of the case was "governed by" ACT I, invalidated the FCC order prohibiting indecent broadcast on 24 hour per day basis. Nowhere does the opinion in ACT I or ACT II even mention, let alone discuss, the "nuisance rationale" that carried the day in Pacifica.

F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978)

("Pacifica") is the only Supreme Court case on the subject of broadcast indecency, and in Pacifica, this Court did not say that material indecent "as broadcast" is protected by the Constitution and that a time of day must be found when patently offensive, indecent language can be broadcast uninvitedly into the privacy of every home. In Pacifica, this Court recognized that indecent language, which very well may be protected in other contexts or media, can nevertheless be prohibited "as broadcast." Id., at 746 [W]e may assume, arguendo, that this monologue would be protected in other contexts; " id ., at 759-60 (Powell, J., concurring): "Although the First Amendment may require unwilling adults to absorb the first blow of offensive. . .speech when. . . in public..., a different order of values obtains in the home. , . .This is not to say. . .the [FCC] has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves...but...its judgment is entitled to respect" [emphasis supplied].

Mr., Justice Stevens, who delivered the opinion of this Court in Pacifica with respect to Parts I, II, III and IV-C, compared indecent broadcast to a "pig in the parlor instead of the barnyard" and noted that a "nuisance may be merely a right thing in a wrong place" [emphasis supplied]. Id., at 750. Mr. Stevens also addressed the concept of "nuisance speech" in Parts IV-A and IV-B of his Pacifica opinion. Mr. Justice Powell did not join in these Parts only because he objected to the characterization of indecent language as "less 'valuable."' Id. at 761 (Powell, J., concurring) [But see, Barnes v. Glen Theatre, Inc., 501 U.S. ____, 115 L.Ed. 2d 504 (1991); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988), New York v. Ferber, 458 U.S. 747, 762-64 (1982); California v. LaRue, 409 U.S. 109, 118 (1972)]. In Pacifica however, the plurality opinion constitutes the holding of the Court and provides the governing standards because its rationale set forth the narrowest ground for the result. See Marks v.

United States, 430 U.S. 188, 193-194 (1977); Lakewood v Plain Dealer, 486 U.S. 750, 764 n.9 (1988).

In concluding that a broadcast of "patently offensive words dealing with sex and excretion" could be regulated "because of its content," Mr. Justice Stevens stated in Pacifica at 438 U.S. 746:

> "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content..First Amendment protection would be required. But that is simply not the case. These words offend for the same reason obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S] uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S., at 572."

Mr. Justice Murphy's statement in Chaplinsky was a "paraphrase" of a statement found in Zechariah Chafee, Jr.'s Free Speech in the United States, Harvard University Press (1942), which was cited by this Court in Chaplinsky at 315 U.S. 572, notes 4 & 5. Chafee in his book states at pages 149-150:

> "[B]ut the law also punishes a few classes of words like obscenity, profanity, and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners...or else to

> render highly probable an immediate breach of the peace. This is a very different matter from punishing words because they express ideas.... I believe that if properly limited, [these verbal peace-time crimes] fall outside the protection of the free speech classes.... The true explanation is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see. ...The man who swears in a street car is as much of a nuisance as the man who smokes there" [emphasis supplied].

In Rosenfeld v. New Jersey, 408 U.S. 901, at 905-06 (1972), Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, wrote in dissent:

> "But the exception to the First Amendment protection in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of violence. ...[A] verbal assault on an unwilling audience may be so grossly offensive...as to be the proper subject of criminal proscription...under a statute denominating it...a public nuisance. . . [N]either category falls within the protection of the First Amendment" [emphasis supplied].

In Hess v. Indiana, 414 U.S. 105, at 107-108 (1973), this Court, after noting that the First Amendment forbids government from punishing the use of language not within

"narrowly limited classes of speech," found that the language at issue in that case was not "obscene" and did not amount to "fighting words" or to a "public nuisance in that privacy interests were being invaded" [emphasis supplied].

In Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 271, n. 4 (1988), this Court noted that its decision in Bethel School District 403 v. Fraser, 478 U.S. 675 (1986), upholding a school district's authority to prohibit an indecent speech in a school assembly comprised of both adults and students, did not rest upon any finding that the speech had a propensity to "materially disrupt" classwork, but rather on its "vulgar," "lewd" and "plainly offensive" character.

In Federal Communications Commission v. League of Women Voters of California, 468 U.S 364 (1984), this Court distinguished its decision in Pacifica, noting at page 380, n.13:

> In this case...we are not faced with indecent expression, but rather with expression that is at the core of First ,Amendment protections, and no claim is made...that the expression of editorial opinion by noncommercial [broadcast] stations will create the substantial 'nuisance' of the kind addressed in FCC v. Pacifica...." [emphasis supplied],

Based on these cases, it the opinion of Petitioners that indecency in broadcasting is unprotected by the First Amendment and should be treated as such. In Pacifica, this Court recognized that what amounts to a "nuisance" requires consideration of a "host of variables," noting that the Commission had emphasized "[t]he time of day." Id., at 750. Neither the Pacifica Court nor the Commission, however, decided that it would be permissible to broadcast the

particular Carlin monologue at a late hour. Id., at 750, n. 28.

The critical importance of this case was spelled out in a related context by Mr. Chief Justice Burger, with whom Mr. Justice Blackmon and Mr. Justice Rehnquist joined, dissenting in Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972):

> "The important underlying aspect...goes really to the function of law in preserving ordered liberty. ...History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable. ...If continued, this permissiveness will tend further to erode public confidence in the law – that subtle but indispensable ingredient of ordered liberty."

II. IF THE PLURALITY OPINION IN FEDERAL COMMUNICATIONS COMMISSION V PACIFICA FOUNDATION, 438 U.S. 726 (1978), CONTINUES TO BE THE HOLDING OF THE COURT, DID THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ERR IN HOLDING THAT THE FEDERAL COMMUNICATIONS COMMISSION MUST ADOPT A "SAFE HARBOR" APPROACH TO INDECENT BROADCASTING?

Pacifica has frequently been distinguished, but it has never been overruled and is therefore the precedent with respect to the regulation of indecent broadcasts.

A. THE NUISANCE RATIONALE DEVELOPED IN

PACIFICA DOES NOT REQUIRE A "SAFE HARBOR" TIME FOR INDECENT BROADCASTS

In Pacifica, this Court held that the Carlin monologue "as broadcast" was indecent and prohibited by 18 U.S.C. §1464. Using the nuisance rationale, Pacifica Court found that indecent speech was akin to a pig in the parlor. This meant only that the same speech may be afforded full First Amendment protections if uttered in other media. In addition, the nuisance rationale would permit certain material to be broadcast at one time of the day without being found to be indecent while that same speech would be indecent under the concept if broadcast at another time of the day.

This Court in Pacifica suggested that an offensive broadcast "might not be indecent" if it had serious value and was broadcast "in the late evening." 438 U.S. at 732, n.5. This Court also stated that it was not deciding whether "broadcasting audiences in the late evening contain so few children that playing [the Carlin] monologue would be permissible." Id. at 750, n.28. This Court did not, however, say that the Commission was required to permit the broadcast of indecent material during the late hours of the evening or any other time of the day.

Time of day is a variable which the Commission should consider during its administrative review of a potentially indecent broadcast in determining whether that broadcast was in fact indecent under §1464. It is not, however, a constitutionally mandated limitation on the authority of the Commission in setting forth regulations regarding the broadcast of indecent material.

B. THIS COURT'S DECISION IN SABLE COMMUNICATIONS OF CALIFORNIA, INC. V FEDERAL COMMUNICATIONS COMMISSION DID NOT OVERRULE PACIFICA AND IS

CONSISTENT WITH THIS COURT'S DECISION IN PACIFICA.

In Sable Communications of California Inc. v Federal Communications Commission, 492 U.S. 115 (1989), the Supreme Court noted that the "private commercial telephone communications" at issue were "substantially different" from the "public radio broadcasting" at issue in Pacifica. 492 U.S. at 127. The Court in Sable also said that, "Sexual expression which is indecent but non-obscene is protected by the First Amendment . . . ." Id. at 126. The government in Sable, however, did not contend that indecent commercial telephone messages are unprotected, and the Court's statement as it is applied to broadcast indecency is purely dicta. Further, the Court in Sable did not say that a prohibition on indecent communications per se violates the First Amendment, and the issue here is whether a prohibition on matter indecent "as broadcast" violates the First Amendment.

In distinguishing the context of dial-it services from that of the broadcast medium, however, the Sable Court was careful to note that the government's regulation of broadcast indecency furthered two valid governmental interests: 1) protecting adult listeners and viewers from indecent broadcasting which "can intrude on the privacy of the home without prior warning as to program content" and 2) protecting children. In its discussion of Pacifica, the Sable Court stated:

> The Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children . . . ." The private commercial telephone communications at issue here are substantially different from the public radio broadcasting at issue in

> Pacifica. * * *. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services . . . is manifestly different from a situation in which a listener does not wan the received message. Placing a phone call is not the same as turning on a radio and being taken by surprise. . . . [T]he message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

492 U.S. at 127-28.

The Pacifica Court did not say that Carlin's monologue, as broadcast, was protected speech.1/ In Sable the question of whether indecent expression is protected by the First Amendment was not at issue. In Sable, the sole issue, as framed by the parties, was whether a total ban on what the parties considered as a form of protected expression could be justified solely on a protection of minors rationale. Further, in Sable the Court simply said that indecent communications cannot be criminalized "solely because they are indecent." Id. at 126. The Sable Court did not say that indecent material was protected in every context.

The Court of Appeals stated that it viewed this

1[W]e may assume, arguendo, that this monologue would be protected in other contexts." 438 U.S. at 746. See also, "Although the First Amendment may require unwilling adults to absorb the first blow of offensive . . . speech when . . . in public . . ., a different order of values obtain in the home. * * *. This is not to say . . . the [FCC] has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves . . . but its judgment is entitled to respect." 438 U.S. at 759-60 (Powell, J., concurring) (emphasis added).

Court's decision in Sable as adding credence to its decision that indecent broadcasting could be prohibited twenty-four hours per day. This interpretation of the precedential value of Sable and the lack of precedential value of Pacifica is the root of the Court of Appeal's error.

C. THIS COURT'S DECISION IN PACIFICA REMAINS THE LAW OF BROADCAST INDECENCY AND THE COURT OF APPEALS ERRED WHEN IT IGNORED THIS COURT'S PREVIOUS DECISION.

In its decision, the Court of Appeals ignored the holding and applicability of this Court's decision in Pacifica. The decision of the court below was based on "circuit precedent" which compelled the "rejection . . . . of a total ban on the broadcast of indecent material." Action for Children's Television v Federal Communications Commission, 932 F.2d 1504, 1508 (D.C. Cir. 1991). The holding of this Court in Pacifica is clear as to the role broadcast indecency plays in the scheme of the First Amendment hierarchy. "[T]he constitutional protection accorded to a communication containing such patently offensive sexually and excretory language need not be the same in every context." 438 U.S. at 747.

The Court in Pacifica identified two primary reasons for upholding the restrictions on indecent broadcasting. The first was that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." Id. at 748. The second was that "broadcasting is uniquely accessible to children, even those too young to read." Id. at 749.

In concluding the Court recognized that the "Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept

requires a consideration of a host of variables. The time of day . . . the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions." Id. at 750.

The decision of the Court of Appeals in this matter completely discounted the first consideration by this Court in Pacifica, namely, the pervasive of the medium and the intrusive nature of the indecent language into the private homes of unsuspecting listeners. The pervasiveness that this Court was concerned about in Pacifica has grown in magnitude and should be as much of, if not more of, a concern today than it was in 1978.

As the Commission noted in its Recommendation and Report, technological advances since 1978 have made the media more accessible and more immediately pervasive to individuals. The Commission considered the prevalence of video cassette recorders, portable radios and televisions and the increase in the number of stations or channels available to any one individual. None of these findings was recognized by the court below.

In fact, the decision of the Court of Appeals is inapposite to the holding of this Court in Pacifica. The Pacifica Court acknowledged that the Commission was well within its authority to proscribe indecent speech. Nowhere in its opinion did the Court suggest or intimate that the Commission would be required to provide a space on the airwaves for indecent speech. The Pacifica Court's findings were based upon those of the Commission with specific reference to the statements of Commissioners Robinson and Hooks who stated that "'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct." 438 U.S. at 732, n.6. This language clearly contemplates a nuisance rationale rather than the adoption of a "safe harbor" by the Commission.

D. MORE RECENT DECISIONS BY THIS COURT ON THE SUBJECT OF PUBLIC INDECENCY SUPPORT THE COURT'S DECISION AND RATIONALE IN PACIFICA.

In addition, since the decision by the court below in this case, this Court has rendered its decision in Barnes v Glen Theatre, Inc., 501 U.S._____, 115 L.Ed.2d 504 (1991). In Barnes, this Court discussed, in the context of regulating public nudity and nude performances and found that "the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." 115 L.Ed.2d at 511. This Court found that the state could legitimately prohibit public nudity as a "societal disapproval of nudity in public places and among strangers." Id. at 515.

These observations, coupled with this Court's previous decision in Pacifica, lead to the conclusion that the Federal Communications Commission, using a nuisance rationale, could constitutionally prohibit the broadcast of indecent material. In finding otherwise, the Court of Appeals erred. For these reasons, this case presents important issues of federal law which should be settled by this Court. U.S. Sup. Ct. R. 10.l(c).

III. IS THE PROHIBITION IN TITLE 18 UNITED STATES CODE, SECTION 1464 REGARDING INDECENT LANGUAGE AN "INDECENT FOR

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF

THIS COURT, TO-WIT: THAT GOVERNMENT MAY SUPPRESS INDECENT BROADCAST ONLY TO THE EXTENT NECESSARY TO PROTECT CHILDREN.

In ACT I, a panel of the Federal Circuit upheld the FCC's "generic definition" of "indecent" in light of the "sole purpose of that definition: to permit the channeling of indecent material inorder to shelter children...." Id., at 852 F.2d 1340. In ACT II, a second panel of the Federal Circuit, after indicating that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts," vacated the FCC order under review and directed the FCC to "carefully...address the specific concerns we raised in ACT I." ACT II, 932 F.2d at 1510.

The prohibition in 18 U.S.C. 1464 on indecent broadcast, however is not based on a "harmful to minors" standard. Unlike the standard upheld in Ginsberg v. New York, 390 U.S. 629 (1968), which was aimed at protecting minors from material harmful to them, the prohibition on obscene or "indecent" broadcast was enacted by Congress to protect all of the American people.

The concept of "indecent" is inextricably linked to that which of offends societal standards of propriety, modesty and morality and has never been based solely or primarily on what is appropriate for minors, See, e.g., Barnes v. Glen Theatre, Inc.,115 L.Ed. 2d at 512 (1991) ("Public indecency statutes were designed to protect public morality and public order"). As this Court noted in Pacifica, the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." Id., at 438 U.S. 740. The Commission' s narrow definition of "indecent" emerged essentially as the second prong of the obscenity set forth in Miller v. California, 413 U.S. 15 (1973). Even before Miller,

as the Pacifica Court noted at 438 U.S. 740, n. 15, Justice Harlan equated indecency with the concept of patent offensiveness when he stated:

> "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency – a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'" Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).

In Pacifica, this Court recognized that the indecency standard in 18 U.S.C. is an "INDECENT FOR ALL" standard which is determined for a mixed audience of both adults and children and that government has a valid interest in protecting unwilling adults from patently offensive, indecent material presented over the airwaves, which confronts them not only in public but also in the privacy of the home where the individuals right to be left alone plainly outweighs the First Amendment rights of an intruder. Id., at 748-49; id., at 759-60 (Powell, concurring). This Court has never "disavowed" this important government interest in protecting unwilling adults in the privacy of the home from indecent broadcast. Frisby v. Schultz, 487 U.S. 474, 485 (1988); Sable Communication of California, Inc. v. FCC, 492 U.S. 115, 127 (1989).

Under the holding in ACT II, the prohibition on broadcast indecency in 18 U.S.C. 1464 – which was enacted to protect ALL AMERICANS *and which has* been narrowly defined by the FCC to be largely limited to material that is the subject of the second-prong of the ADULT obscenity test – can now only be enforced to the extent necessary to protect CHILDREN.

IV. DOES THE DECISION OF THE COURT BELOW, REQUIRING THE FEDERAL COMMUNICATIONS COMMISSION TO DEMONSTRATE THAT THE RESTRICTION ON INDECENT BROADCASTING IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERMENTAL INTEREST, COMPORT WITH FEDERAL COMMUNICATIONS COMMISSION V PACIFICA FOUNDATION, 438 U.S. 726 (1978), AND FEDERAL COMMUNICATIONS COMMISSION V LEAGUE OF WOMEN VOTERS, 468 U.S. 364 (1984), BOTH OF WHICH APPLIED A DIFFERENT STANDARD OF REVIEW TO THE BROADCAST REGULATION AT ISSUE?

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, TO WIT: THAT THE FCC MUST SHOW THAT THE 24-HOUR-A-DAY PROHIBITION ON INDECENT BROADCAST IS THE LEAST RESTRICTIVE MEAND OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST.

In support of its holding, the ACT I panel cited this Court's decision in Consolidated Edison Co. v Public Service Comm'n, 447 U.S. 530 (1980), for the proposition that "content-based restrictions ordinarily 'may be sustanined only

if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.'" ACT I, at 852 F.2d 1343, n. 18. In Consolidated Edison, this Court invalidated an order of the New York State Public Service Commission which struck "at the heart of the freedom to speak." Id., at 447 U.S. 535. In support of its holding, the Court in Consolidated Edison cited First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)—a case which was decided the same year a Pacifica and which involved speech "at the heart of the First Amendment" and government action that "suggest[ed] an attempt to give on side of a debatable question an advantage in expressing its views to the people...." Bellotti, at 435 U.S. 776, 785.

In Consolidated Edison, however, this Court also said that governmental regulation "based on subject matter has been approved in narrow circumstances" and cited Pacifica as an example of courts looking "to the content of expression" when asked to determine "whether a species of speech is covered by the First Amendment." Consolidated Edison, at 447 U.S. 538, n. 5. In Pacifica, this Court distinguished Bellotti, recognizing that the prohibition on indecent broadcast is not aimed at the content of serious communication but rather on the way in which the point of view is expressed. Pacifica, at 746, notes 21 and 22; Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986) ("certain modes of expression are inappropriate and subject to sanction"). In Pacifica, this Court did not subject the Commission's indecency order to "exacting scrutiny"—as it did the regulations in Bellotti and Consolidated Edison.

In support of its holding, the ACT II panel cited this Court's decisions in Consolidated Edison and Sable, for the proposition that government "'may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.'" ACT II, 932 F.2d at 1509. In

Sable, however, this Court also recognized that the Pacifica opinion "relied on the 'unique' attributes of broadcasting, noting that broadcasting its 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children...." Sable, at 127.

In FCC v. League of Women Voters of California, 468 U.S. 364 (1984), this Court noted that because broadcast regulation involves such "unique considerations," its decision have "never gone so far as to demand that such regulations serve 'compelling' governmental interesting" [emphasis supplied]. Id., at 376. Of Pacifica, the Court in League of Women Voters of California said at 468 U.S. at 380, n. 13:

> "There, the Court focused on certain physical characteristics of broadcasting – specifically, that the medium's uniquely pervasive presence renders impossible any prior warning for those listeners who may be offended by indecent language, and second, that the ease with which children may gain access to the medium, especially during daytime hours, creates a substantial risk that they may be exposed to such offensive expression...."

Unlike the contest of the telephone "dial in" service, where adults do choose to receive the communication, the broadcast medium's pervasive presence renders impossible an informed decision to receive or reject an indecent broadcast, and when "expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees." Ginsberg v. New

York, 390 U.S. 629, 649 (1976) (Stewart, J., concurring). To say that an offended listener may simply turn the channel does "not avoid a harm that has already taken place." Pacifica, at 438 U.S. 749. A child – like someone in a captive audience – is not deemed to possess that "full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, at 390 U.S. 649-50 (Stewart, J., concurring).

An article by Paul J. McGeady entitled "Obscenity Law and the Supreme Court," in Where Do You Draw The Line, pp. 102-103 (V. Cline, ed 1974), explains why a prohibition on indecent broadcast is absolutely necessary to protect the American people, especially children, from the psychological ravages of pornography and to protect the moral fabric of society:

> "Does not the Supreme Court['s Miller] opinion say the you can present explicit hard-core sex...on TV if the 'play' or 'film' or 'live performance' has literary or artistic value? It would appear that most Americans obviously would not tolerate this. While they might tolerate these distinctions in books, magazines, or even motion pictures, they would not tolerate the concept that they must switch the dial to avoid such performances on TV or radio or that they must be concerned that their minor children may be exposed to the same. ...It is quite obvious that different standards must be applied to TV and radio.... Television and radio communications certainly partake of the nature of a public access thoroughfare (albeit an electromagnetic one) and what may be prohibited on the public street should be equally prohibited on TV and radio. This includes undoubtedly all soft-core

> or hard-core sexual, explicit conduct as well as nudity. These programs come into the home, and under the doctrine of Breard v. Alexandria, 342 U.S. 622 (1951), the usual broad play afforded free speech may be curtailed. What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? ...We suggest that the quality involved is 'Intrusiveness' (as in Breard). ...Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance, so too he is entitled to 'flip the dial' without viewing intrusive nudity or explicit hardcore sex. Is he supposed to review the program for 30 minutes or one hour to determine if the work 'taken as a whole' has [serious] value? Most probably the Supreme Court did not intend this result and is awaiting the opportunity to correct this deficiency as soon as a proper case in this area presents itself for adjuction. In the meantime, we are left with an anomoly."

A. THE GOVERNMENTAL INTEREST IS SUBSTANTIAL--EVEN COMPELLING--AND THE ONLY MEANS OF FURTHERING SAID INTERESTS IS TO RESTRICT THE PROBLEM AT ITS SOURCE.

As the result of the District of Columbia Circuit Court of Appeals' opinion of May 17, 1991, indecent materials – that is, "language or material that, in context, depicts or

describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" — may be broadcast during "channeled" time period, probably the late evening hours and early morning.

Petitioners consider this decision to be of great public importance in that it affects large numbers of persons and involves fundamental constitutional rights. Indecent material, constitutes a wide range of programming that may now find its way into millions of Americans' living rooms each night, assaulting adults and harming children. Since only materials which are deemed obscene pursuant to Miller v California, 413 U.S. 15 (1973) will be prohibited from being broadcast over television and radio during these later night and early morning hours, much programming considered offensive by millions — full nudity, sexual intercourse, masturbation, orgies, sado-masochistic abuse, and so on — will now assault adults and children alike. The only defense left by the Court's decision is to turn off the switch, which is always after "absorbing the first blow" in their own homes or cars.

1. The government's interest in the protection of residential privacy

The Supreme Court has long recognized that each means of speech or expression presents unique First Amendment problems. Joseph Burstyn, Inc. v Wilson, 343 U.S. 495 (1952). Broadcasting, of all the forms of communications, receives the least First Amendment protection. FCC v Pacifica Foundation, 438 U.S. 726, 747 (1978). In Pacifica, the Court explained why this is the case:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Second, broadcasting is

> uniquely accessible to children, even those too young to read.

438 U.S. at 748-49.

In discussing the first reason or basis ("pervasive presence") for the lesser protection of broadcast, the court emphasizes the individual's right to be "left alone" in the privacy of the home.

The protection of residential privacy is well-established in a long line of Supreme Court cases as being an important and significant government interest. In Rowan v United States Post Office, 397 U.S. 728, 736 (1970), the Court examined the challenged statute in light of the First Amendment by balancing "the right of every person 'to be let alone' . . . with the right of others to communicate." In doing so, the Court stated:

> In today's complex society, we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

397 U.S. 736-37 (emphasis added).

Again, in Carey v Brown, 447 U.S. 455 (1980), and Frisby v Schultz, 487 U.S. 474 (1988), the Supreme Court recognized the importance of residential privacy when examining statutes which barred picketing of residences: "In all such cases, we have been careful to acknowledge that

unwilling listeners may be protected when within their own homes. . . . There simply is no right to force speech into the home of an unwilling listener." Frisby, 487 U.S. at 485.

Finally, the Court noted in Pacifica that:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

438 U.S. at 748.

Therefore, as demonstrated by this line of Supreme Court cases, the right "to be left alone" in one's own home is an important governmental interest, which is violated by the Court of Appeals' ruling in this case.

2. The government's interest in the well-being of children and supporting parents in their child-rearing duties justifies a 24-hour proscription of indecent broadcast

In addition to the preservation of the sanctity of the home and protecting adults from unwanted assaults of offensive materials, the government has additional important and substantial interests – indeed, compelling interests: protection of the physical and psychological well-being of children and support of parental supervision and child-rearing duties.

The Supreme Court has recognized these governmental interests in upholding a number of statutory schemes. In Ginsberg v New York, 390 U.S. 629, 639-40 (1968), the Court found the governmental interests in supporting parents and in the well-being of its youth to be so compelling that the Court approved legislation which

shielded minors from the influence of material that was not obscene by adult standards.

In Sable, 492 U.S. 115 (1989), the Court, while examining the problems associated with dial-a-porn, again "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." New York v Ferber, 458 U.S. 747, 756-57 (1982) further recognizing these interests in our nation's children as substantial and "compelling," in discussing the problem of child pornography.

The report of the FCC found that children were in the broadcast audience at all hours of the day and night – on a twenty-four hour basis. The FCC further concluded that the saturation of American society by the broadcast media, coupled with other relevant factors, makes "effective parental supervision exceedingly difficult, if not impossible, for the average parent." Report of the Commission, p. 27, ¶61.

Because parental supervision is an impossibility and because of the pervasiveness of the problem, the only way to protect children, aid parents in their child-rearing duties, and protect residential privacy, is to restrict indecent broadcast at its source – that is, proscribe it on a 24-hour basis. Of course, nothing bars parents who so desire from providing sexually explicit and offensive materials to their offspring by other means.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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